IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 72,492

WESTLAND SKATING CENTER, INC. and HIALEAH SKATING CENTER, LTD., by and through WAYNE D. LIPPMAN and STEWART L. CAUFF, as General Partners,

Plaintiffs, Petitioners,

v.

GUS MACHADO BUICK, INC. and MORRISON ASSURANCE CO.,

Defendants, Respondents.

PLAINTIFFS', PETITIONERS' BRIEF ON DISCRETIONARY JURISDICTION OF THE SUPREME COURT

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STATEMENT OF THE CASE

On September 29, 1981, Plaintiff, Petitioner, Westland Skating Center, Inc. ("Westland")[1/], filed its Complaint against Seipp Buick, Inc. ("Seipp Buick"), predecessor-in-interest of Defendant, Respondent, Gus Machado Buick, Inc. ("Machado Buick"). Westland stated counts for nuisance, negligence, intentional interference with natural easement and trespass, and sought both damages and injunctive relief. It alleged that: (a) historically and prior to June, 1981, surface rainwater flowed from property which it leased in Hialeah, Florida, downhill to contiguous property owned by Seipp Buick; (b) in June, 1981, Seipp Buick constructed a wall intended to function as a dam; (c) the wall ran the entire length of Westland's common boundary line; (d) on August 15 and September 25, 1981, the wall acted as a dam to the natural flow of surface rainwaters; and (e) as a result, floods occurred that damaged the Westland Skating Building.[2/]

On August 1, 1983, Plaintiffs, Petitioners moved for a Partial Summary Judgment declaring that a lower elevation property owner is liable for damages if he obstructs the natural flow of surface water from an upper elevation adjoining property which results in flooding of the upper elevation property. On December 15, 1983, the trial court granted Partial Summary Judgment on the legal standard and specifically noted that it was not resolving any issue of fact, nor making any determination regarding liability.

1/ Plaintiffs, Petitioners will refer to Plaintiff, Petitioner Westland, as "Westland" and will refer to the building which it leased (and operated) as the "Westland Skating Center".

2/ On June 16, 1982, Westland filed an Amended Complaint, wherein Plaintiff, Petitioner, Hialeah Skating Center, Ltd. ("Hialeah Skating"), acting through its general partners, joined the action as party-plaintiff. Hialeah Skating built the Westland Skating Center and leased it to Westland. For convenience, Plaintiffs, Petitioners will refer to both as Westland.

Plaintiffs, Petitioners also named as Defendant, Respondent, Morrison Assurance Co. ("Morrison Assurance"), the liability insurance carrier for Seipp Buick. For convenience, Appellees will refer to both Defendants, Respondents as "Machado Buick".

On September 18, 1985, the parties began a seven (7) day jury trial. The jury: (a) returned a verdict for Westland and Hialeah Skating on Counts I, II and III for nuisance, negligence and intentional interference with a natural easement, respectively; (b) assessed the damages sustained by Westland at $800,000; (c) found that Hialeah Skating was ten percent negligent, while Machado Buick was ninety percent negligent; and (d) assessed Hialeah Skating's damages at $324,000. On October 9, 1985, the trial court entered separate Final Judgments for Westland and Hialeah Skating.

On May 19, 1987, the Third District Court of Appeal ("Third District") reversed and remanded the Judgment of the Circuit Court. (Appendix at 1) (hereinafter "App. at _"). The Third District held that the Circuit Court incorrectly granted Westland's Motion for Partial Summary Judgment. (App. at 1) Plaintiffs, Petitioners timely moved for rehearing and rehearing en banc.

On April 26, 1988, after over eleven months, the Third District denied the Motions for Rehearing and Rehearing En Banc, the latter by a six to three vote. Judge Wilkie Ferguson authored a nine page opinion dissenting from the Order denying rehearing en banc in which Judges Schwartz and Pearson concurred (App. at 4).

STATEMENT OF FACTS

Westland leased a building and skating center located at 1545 West 46th Street in the City of Hialeah, Florida which was constructed by its landlord, Hialeah Skating. The Westland property is contiguous to property owned by Machado Buick, with the rear of the Westland Skating Center building approximately ten (10) feet from the property line of Machado Buick. Historically, because the Westland property had a higher elevation than the Machado Buick property, rainfall that accumulated moved from the Westland property downhill to the Machado Buick property.

In October 1970, Machado Buick's predecessor-in-interest constructed its dealership and opened for business. Because it remained at a lower elevation than the

Westland property, rainwater continued to run off and flow from the property where the Westland Skating Center later would be constructed down to the Machado Buick property. In April 1979 and 1980, before the Westland Skating Center was constructed, floods occurred and Seipp Buick suffered water damage to its vehicles on the lower elevation back lot.

In 1979, Hialeah Skating employed a licensed architect to design the Westland Skating Center. He designed the Westland Skating Center to comply with the South Florida Building Code ("Code"), which had been adopted by the City of Hialeah. The design considered and met the Code's specific alternatives and mathematical formulas required for the disposal of rainwater. The actual construction of the Westland Skating Center also complied with the Code.

After the Westland Skating Center and Seipp Buick dealership were constructed, the Westland property remained higher than the Machado Buick property and the surface flow of rainwater remained the same as before construction. Seipp Buick constructed a wall approximately 8 feet high and 32 inches deep specifically designed and intended to stop the flow of water from the Westland property down onto the Seipp Buick rear lot.

On August 15, 1981, the wall acted as a dam to the natural flow of water and caused rainwater runoff that hit the wall to return to flood the Westland Skating Center. On September 25, 1981, Westland suffered a second flood despite its emergency precautions.

After the floods, Hialeah Skating and Westland retained two experts to render an opinion cause of the August and September 1981 floods. Both experts advised and later testified that the wall constructed by Machado Buick acted as a dam to the flow of water in a heavy rainfall and caused the flooding of the Westland Skating Center. Subsequently, Westland filed suit to recover the damages it sustained because of the floods.

SUMMARY OF ARGUMENT

The decision of the Third District in this case expressly and directly conflicts with the rule of law announced by the Fifth District in Seminole County v. Mertz, 415 So.2d 1286 (Fla. 5th DCA), cert. denied, 424 So.2d 763 (Fla. 1982). The Third District stated that "Florida follows the civil law rule regarding surface water" (emphasis added) (App. at 2), so that a higher elevation land owner may not build on his land if he increases or diverts the natural flow of water onto the lower land without losing the existing servitude for the flow of surface water. It expressly rejected the "reasonable use" rule embraced by the Fifth District in Seminole County as the controlling law in Florida. In that case, the Fifth District stated that "[c]ourts of Florida have applied, in an almost unbroken line of decisions, practically all of the elements of the modified civil law rule of surface water" (emphasis added). Seminole County, supra, 415 So.2d at 128. Under the "modified civil law", which also is known as the "reasonable - use" rule (App. at 9), courts reject the strict application of the civil law rule to permit a higher elevation land owner to improve and develop his land, particularly in urban areas, without losing the servitude for the flow of surfact water if he acts reasonably -- even if the flow of surface water is diverted or increased. Accordingly, the decision of the Third District irreconcilably conflicts with the rule of law announced as controlling by the Fifth District.

Moreover, the Third District in this case applies the "civil law rule" to produce a different result from that reached by the Second District in Pearce v. Pearce, 97 So.2d 329 (Fla. 2d DCA 1957), which involves substantially the same controlling facts. The irreconcilable conflict between the decisions of the Second and Third Districts is perhaps best explained by confusion as to the governing rule in Florida. The Second and Third Districts could not have arrived at such conflicting decisions if the Florida appellate courts were clear as to the controlling rule of law regarding surface water and its application.

The Supreme Court should exercise its discretion and entertain this case on the merits because it is of exceptional importance in all jurisdictions in Florida and is necessary to cure the confusion engendered by these blatantly conflicting decisions -- the law controlling in Florida must be the same in all Florida's jurisdictions. Although the Florida legislature has mandated that jurisdictions adopt a Building Code to govern building construction, the Supreme Court never has addressed the precise issue before the Third District -- whether construction in strict conformity with the applicable Building Code constitutes a reasonable use of the property which prevails over any inconsistent "common" law regarding the use of property. Because of Florida's enormous growth and substantial construction in compliance with now mandated building codes, this case is of exceptional importance and should be heard by the Supreme Court.

ARGUMENT

I. THE SUPREME COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE THIRD DISTRICT BECAUSE IT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEALS ON THE SAME QUESTION OF LAW.

A. The Decision Of The Third District Expressly And Directly Conflicts With A Rule Of Law Announced By The Fifth District Court Of Appeal.

Florida appellate courts have applied two rules regarding the disposal of "surface water" which are in irreconcilable conflict. First, under the so-called "civil-law rule", a lower elevation landowner owes a servitude to an adjacent higher elevation landowner to accept the discharge of surface waters naturally flowing. See, e.g., Libby McNeil & Libby v. Roberts, 110 So.2d 82, 84-85 (Fla. 2d DCA 1959). However, under this rule, the higher elevation landowner may not increase or divert the natural flow of water on to the lower land without losing the servitude. See, e.g., New Homes of Pensacola, Inc. v. Mayne, 169 So.2d 345, 347 (Fla. 1st DCA 1964).

Second, under the so-called "reasonable-use doctrine", which modifies the civil law rule, a landowner is privileged to improve his land by constructing a building without liability for an altered water flow if the improvement is "reasonable". See Seminole County v. Mertz, 415 So.2d 1286 (Fla. 5th DCA), cert. denied, 424 So.2d 763 (Fla. 1982). Under increasing development and urbanization, modern Florida courts have adopted this so called "reasonable-use" doctrine. See Seminole County, supra. Under this modified civil law rule the higher elevation landowner does not lose its right to the servitude unless the improvement is unreasonable. The lower elevation landowner may not interfere with that servitude by blocking the flow of water. The trial court applied the "reasonable-use" doctrine to the facts and gave jury instructions in accord with that doctrine.

In reversing and remanding, the Third District states that "Florida follows the civil law rule regarding surface water" (emphasis added) (App. at 2). In direct and express conflict with the "reasonable-use" doctrine embraced by the Fifth District in Seminole County as discussed above, the Third District rejects the "reasonable use" rule as the controlling law in Florida. Strictly applying the "civil law" rule without regard to the facts, the Third District holds that Westland could not have constructed its building on its higher elevation property, even in strict compliance with applicable law (the Building Code), without losing its servitude for the flow of surface water. Therefore, the Third District holds that Machado Buick was entitled to build its dam.

In irreconcilable conflict, the Fifth District has stated that "[c]ourts of Florida have applied, in an almost unbroken line of decisions, practically all of the elements of the modified civil law rule of surface water."[3/] See Seminole County, supra

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3/ Citing Brumley v. Dorner, supra, the Fifth District further disagreed with the Third District by noting that the modified civil law rule differs from the strict civil law rule for an action which merely increases the accumulation of water in the same flow, but does not divert such flow. Mertz, supra, 415 So.2d at 1289.

(citing F. Maloney, S. Plager, R. Ausness, B. Canter, Florida Water Law 617 (1980) ("courts of Florida have in an almost unbroken line of decisions adopted practically all of the elements of the more liberal and logical modifications of the civil law rule") ("Florida Water Law"). Under the "modified civil law" or "reasonable-use" rule (App. at 9), courts reject the strict application of the civil law rule to permit the improvement and development of land, particularly in urban areas. See F. Maloney, S. Plager and Fletcher Baldwin, Water Law Administration: The Florida Experience § 72 (1968) ("Water Law Administration"). Thus, the Third and Fifth Districts apply conflicting rules of law to cases regarding the disposal of surface water and reach conflicting results. See also Bray v. City of Winter Haven, 40 So.2d 459, 461 (Fla. 1949) (upper elevation landowner may improve property drainage by collecting surface water and discharging into common stream even though volume of discharge may increase); Edason v. Denison, 142 Fla. 101, 194 So. 342 (Fla. 1940) (same).

The need to modify the civil law rule acknowledged by the Fifth District in Mertz was first noted by the Supreme Court almost seventy years ago in Brumley, supra. Although the Supreme Court noted the existence of both the civil law and old common enemy rules[4/], it declined to expressly adopt either. However, it stated that both have "been considerably modified by the courts, and it seems to be almost the unanimous verdict of the courts that each case must stand upon its own facts." Id. at 913-14 (emphasis added). Consequently, as long ago as 1919, the Supreme Court noted the need to modify the civil law rule of surface water as later expressed by the Fifth District in Mertz, but rejected here by the Third District. (App. at 2-3). Accordingly, the decision of the Third District directly and expressly conflicts with this pronouncement of the Supreme Court followed by the 1982 decision of the Fifth District.

4/ Under the so-called "common enemy rule", a lower elevation landowner holds an absolute privilege to protect himself from surface water by any means without liability for the harm that he may inflict on other landowners. See Water Law Administration, supra, § 72.

II. THE SUPREME COURT SHOULD EXERCISE ITS DISCRETION AND ENTERTAIN THE CASE ON THE MERITS BECAUSE IT IS OF EXCEPTIONAL IMPORTANCE IN FLORIDA.

The Supreme Court should exercise its discretion and entertain the case on the merits because it is of exceptional importance in all jurisdictions in Florida and to cure the confusion engendered by these blatantly conflicting decisions. The Supreme Court never has directly stated whether Florida courts should apply the civil law or modified civil law (reasonable-use) rule governing the disposal of surface water in Florida. It is not clear, therefore, what is the controlling common law in Florida. As a consequence, several district courts of appeal have announced that different rules are controlling in Florida or reached different decisions on substantially the same controlling facts. The Supreme Court should exercise its discretion to resolve this conflict -- the law must be the same in all Florida's jurisdictions.

The Supreme Court also should entertain this case because of the substantial impact that the Third District's decision will have on construction in all jurisdictions in Florida that have complied with Florida's legislative mandate and adopted a Building Code. The Florida legislature has mandated that all local governments and state agencies with building construction regulation responsibilities adopt a building code which covers all types of construction. See § 553.73, Fla. Stat. (1987). The Supreme Court has not addressed the precise issue before Third District -- whether construction in strict conformity with the applicable Building Code constitutes a reasonable use of the property which prevails over any inconsistent "common" or non-statutory law regarding the reasonable use of property or the disposal of surface water. Cf. Ripley v. Ewell, 61 So.2d 420, 421 (Fla. 1952).

As noted in dissent by Judge Ferguson, the modified civil law or reasonable-use rule recognizes the privilege of the landowner to improve his land without liability for altered waterflow provided that his alteration is reasonable. (App. at 8).

Here a higher elevation landowner built in strict compliance with law (the building code), was flooded out of business by its neighbor's intentional act and yet was denied a jury verdict because the outdated "civil rule" was applied. In the Fifth District, the jury verdict would have been affirmed based on the "reasonable use" rule.

Because of Florida's enormous growth and substantial construction in compliance with now mandated building codes this case is of exceptional importance and should be heard by the Supreme Court.

CONCLUSION

Accordingly, Westland and Hialeah Skating, respectfully submit that the Supreme Court has certiorari jurisdiction because of an express and direct conflict and should exercise its discretion and entertain the case on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to PAMELA BECKHAM, ESQ., Carey, Dwyer, Cole, Eckart & Mason, P.A., Attorneys for Defendants, Respondents, 2180 S.W. 12 Avenue, P.O. Box 45088, Miami, Florida 33245-0888, this 17 day of June, 1988.

_____
STEVEN M. GOLDSMITH